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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/870,806	05/31/2001	Jennifer Bernitt	2105.2225	1280

5514 7590 06/04/2003

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EXAMINER

BHAT, NINA NMN

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 06/04/2003

6

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/870,806

Applicant(s)

Bernitt et al.

Examiner

N. Bhat

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 May 2001.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-18 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 5. 6) ☐ Other: _____

DETAILED ACTION

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. Claims 1-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schramm et al.

Schramm et al. disclose the invention substantially as claimed.

Schramm et al. teach a color composition which is used in an aqueous containing beverage or dessert. The color composition is water soluble even when using water insoluble lakes. [Note Column 1, lines 21-46] Specifically, Schramm et al. teach making color blends, which includes using FD&C Red No.2, FD&C Red No.3, FD&C Yellow No. 6, etc. The color blends can further includes water soluble dyes such as beet juice, beet powder, calcium carbonate, carbon black, carmine, carminic acids, calcium carbonates, carrot oil, cochineal, grape skin extract, paprika, curcumin, xanthophylls, oleoresins, riboflavin, saffron, turmeric, curcumin. Schramm teaches that all of the FD&C colors are water soluble in their acid form and all of the acid forms dissolve at a low pH with the exception of Red No. 3 which is soluble at

Art Unit: 1761

higher pH's. The ratio of acid to color can be adjusted to provide proper solubility of the insoluble lakes. It has been found that most the lakes are soluble at a pH of 6 or below and the pH of the food products containing an acid will usually be below 3. Schramm et al. further that that insoluble lakes can be blended to provide shades such as cherry, lime, orange, lemon-lime, and other types of colors and teaches that blending can be carried out within the skill of the art to obtain a desired color for a given product. The blended colors are designed so that the colors do not separate out or flash during storage. Schramm et al. further teach that by knowing the amount of insoluble lakes originally added and the amount of soluble dyes used for adjustment the insoluble lakes and soluble dyes can be mixed in a predetermined ratio and used as a mixture.[Note Column 4, lines 1-73]

Although, Schramm et al. does not specifically teach providing a orange food coloring composition which consists essentially of yellow dye and red dye in the specific ratios as claimed by applicant, Schramm et al. does teach that mixing colors to make blended colors in particular ratios which provides best results is well within the purview of the ordinary artisan and teaches that solubility, pH, type of beverage or food application, shelf life, flashing are parameters which are to be considered when mixing FD&C food dyes and other dyes for providing best results and colors in foods or beverages thus rendering the invention as a whole obvious to one having ordinary skill in the art at the time the invention was made. With respect to applicant's "low staining" recitation, it is believed that the blended colors taught in Schramm would provide a low staining blended food coloring composition especially since applicant has not claimed that materials such as surfactant or gallotannin or a stain inhibiting component with the food color composition.

4. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Billington teach an orange coloring material "Orange AB" for coloring foods and

Art Unit: 1761

cosmetics. Basa et al. teach colorants for lipid based edible compositions and teach ratios and proportions for making a caramel colored composition. Grillo et al. teach a method of coating an edible substrate with sugar/syrup using a dry color concentrate. Kirksey et al. teach a color and shelf stable beverage composition comprising FD&C dyes and tea extract.

5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 703-308-3879. The examiner can normally be reached on Monday-Fridays 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-4039. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872- for regular communications and 703-872- for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-305-0779.



N. Bhat
Primary Examiner
TC 1700

May 31, 2003